

¹ Notice Of Appeal Of Order at 1.

this time, the Board will not consider either the Affidavit or the Motion. The issues raised on appeal are:

1. Did claimant suffer accidental injury arising out of and in the course of his employment?
2. At the time of claimant's accident, did the employer-employee relationship exist between claimant and the respondents or was claimant an independent contractor?
3. Is there a contractor or a subcontractor relationship between claimant and respondent Bruce Huskey (hereinafter Huskey)?
4. Did Huskey's payroll exceed the \$20,000 statutory minimum set forth in K.S.A. 44-505(a)(3)?
5. Is claimant entitled to ongoing future medical care and reimbursement for past medical care provided?
6. Is claimant entitled to temporary total disability compensation?
7. What was claimant's average weekly wage on the date of accident?
8. Were the respondents denied their due process rights, having not been provided sufficient opportunity to present evidence or testify in this matter?
9. Is the Affidavit of Morris Coltrain, dated March 7, 2006, admissible for the purposes of this appeal?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant suffered accidental injury on August 18, 2005, when he fell from the roof of a house that was being constructed, falling 13 feet onto concrete. Claimant sustained injuries to his right ankle, and he suffered a broken left ankle and a broken right big toe. He underwent surgery on both ankles, although he has been advised by the treating physicians that ankle fusions are a distinct possibility in the future. He is also alleging that his back was injured as a result of this fall. Claimant advised that the doctors were

recommending a possible left ankle replacement, but because claimant is a smoker, the doctors anticipated that the ankle replacement surgery would be less than successful.

The problems in this case arise from the relationship between the parties. Coltrain desired to build a log cabin-style house. Coltrain then contracted with Huskey to build the structure. Huskey then hired claimant and other employees to assist him in the construction of the structure. This was not the first such structure built by Huskey, although it is the first structure built by Huskey for Coltrain. It is the second such structure that claimant worked on for Huskey.

The matter was set for preliminary hearing on February 8, 2006, with appropriate notices being sent to both respondents: Coltrain in Overland Park, Kansas, at the Pierce Medical Clinic; and Huskey in Pigeon Forge, Tennessee. Neither Coltrain nor Huskey appeared at the preliminary hearing. The ALJ, after ascertaining that appropriate notice had been provided, proceeded with the preliminary hearing testimony of claimant.

Claimant's uncontradicted testimony at that time was that he had been hired by Huskey as a subcontractor for Coltrain, the general contractor. Claimant testified that the identity of Coltrain as the general contractor was taken off of the building permits, which were posted at the construction site. Claimant testified that Coltrain took out the building permits and listed himself as "the general."

Claimant testified that he was paid an hourly rate of \$13 per hour, working an average of 40 hours per week. He did occasionally work overtime. He was expected to work 40 hours a week, with Huskey acting as the working supervising foreman at the site. Claimant testified Huskey told him when to work and where to work. Additionally, Huskey was there on a daily basis, supervising the construction. When claimant fell from the roof, it was Huskey's wife, Gail, who took him to the Paola Hospital emergency room. Coltrain in his brief, argues that claimant was an independent contractor and not an employee of either Coltrain or Huskey. However, Coltrain cites no evidence in this record to contradict claimant's testimony regarding the relationship of the parties.

It is often difficult to determine in a given case whether a person is an employee or an independent contractor where there are elements pertaining to both relationships, with the elements being insufficient to be determinative of the actual relationship.² There is no absolute rule for determining whether an individual is an independent contractor or an employee.³

² *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

³ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.⁴

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price;
2. The independent nature of the worker's business or distinct calling;
3. The employment of assistants and the right to supervise their activities;
4. The worker's obligation to furnish tools, supplies and materials;
5. The worker's right to control the progress of the work;
6. The length of time that the worker is employed;
7. Whether the worker is paid by time or by the job; and
8. Whether the work is part of the regular business of the employer.⁵

Based upon the following facts, the Board concludes that claimant should be considered an employee of Huskey. The parties did not contract to perform a certain project or assigned task for a negotiated price, but instead claimant is being paid on an hourly basis. Claimant did not operate a separate or independent business, but instead was working under the supervision and control of Huskey. While there were other workers on the job, there was no indication from this record that claimant had the right to supervise, hire or fire any of those employees. There is no indication in this record as to what, if any, tools claimant furnished or who provided the materials to be utilized on this job. This was not the first such construction project for which claimant was employed by Huskey and, during the several-month relationship between the two, claimant was paid on an hourly basis and was continuously supervised by Huskey. Finally, the work that claimant was

⁴ *Id.* at 102-103.

⁵ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

performing was a regular part of Huskey's business. The Board finds, based upon this record and for preliminary hearing purposes, that claimant is an employee of Huskey and the Award of benefits by the ALJ should be affirmed.

The Board finds, as did the ALJ, that claimant's average weekly wage is \$520 per week. Claimant testified that he was being paid \$13 per hour and averaged 40 hours per week on a regular basis. Pursuant to the limitations of K.S.A. 44-505(a)(3), this computes to approximately \$27,000-per-year salary just for claimant's employment. As claimant testified, there were as many as five other employees working at various, different salary levels. It is clear that Huskey's payroll for the year 2006 would have exceeded the \$20,000 limitation set forth in the statute.

Coltrain argues that he was not provided the due process right to present evidence at preliminary hearing. However, at preliminary hearing, claimant's attorney testified to having provided notice of the preliminary hearing to both respondents. K.S.A. 44-534a requires that written notice of the hearing be provided to the parties at least seven days before the preliminary hearing. The evidence in this record indicates that appropriate notice was provided to both respondents. K.S.A. 44-534a mandates that notice of hearing be provided to the parties. It does not mandate that a hearing require the attendance of all parties. If a party chooses to not attend after having been provided appropriate notice, that is that party's right. The notice provided in this instance was sufficient to have given the respondents the opportunity to appear and present evidence should they so desire. The respondents' due process rights were not violated by this timely notice of hearing.

Finally, the Board is limited under K.S.A. 44-555c(a) to reviewing questions of law and fact as presented to and considered by the administrative law judge. The Board is not a court of first impression and takes no new evidence. In this case, the Affidavit of Coltrain, submitted nearly a month after the preliminary hearing Order was issued by the ALJ, is new evidence and will not be considered by the Board for the purposes of this appeal. However, as stated in K.S.A. 44-534a, these preliminary findings are not binding in a full hearing on the claim, but are subject to a full presentation of the facts.

Coltrain raises the issues regarding claimant's medical care, past, present and future, as well as claimant's entitlement to temporary total disability compensation. Pursuant to K.S.A. 44-534a, these are not issues over which the Board takes jurisdiction on appeal from a preliminary hearing. Those issues are well within the ALJ's jurisdiction to determine, and the Board for preliminary hearing purposes will not address those issues at this time.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh dated February 9, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

c: Steven C. Alberg, Attorney for Claimant
Bruce Huskey, Respondent, 127 Hickman Hallow Road, Pigeon Forge, TN 37738
Greg T. Spies, Attorney for Respondent Morris Coltrain
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director